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No.

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1992

RODNEY WAYNE SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.) Can the alleged fear of discovery justify the warrantless entry into a house, where any risk of discovery was created by the police?

2.) Can a fear of discovery sufficient to create an exigent circumstance be based on police confrontation with a third party when there is little or no evidence that the third party knew the suspect or knew that the suspect was under investigation?

3.) Can a search warrant be an independent source of evidence where inforamtion gained during an illegal entry was a substantial contributing factor to the issuance of the warrant?

4.) Can a search warrant, even if otherwise valid, be an independent source of evidence discovered during an illegal entry and continuously kept in police possession?

5.) Should the "beyond a reasonable doubt" standard be used to evaluate the harmfulness of evidence which violate the Confrontation Clause and against which defense counsel raised a hearsay objection?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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REPORTS OF OPINIONS

There is no reported decision in this case by another court. The unpublished opinion of the Virginia Court of Appeals and the decision by the Supreme Court of Virginia are set forth in the Appendix to this Petition.

GROUNDS OF JURISDICTION

On August 10, 1992, the Supreme Court of Virginia refused the Petition for Appeal of Rodney Wayne Smith. The statutory provision believed to convey on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Section 1257(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved in this case are as follows:

(A.) Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(B.) Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

(C.) Fourteenth Amendment to the United States Constitution:

> "No state shall...deprive any person of life, liberty, or property, without due process of law..."

The statutory provisions involved in this case are as follows:

(A.) Va. Code Section 182.-248.1(a) (2) and (3):

> "...it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.
>
> "(a) Any person who violates this section with respect to:
>
> "(2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;
>
> "(3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years."

(B.) Va. Code Section 18.2-10:

> "The authorized punishments for conviction of a felony are:
>
> (e) For Class 5 felonies, a term of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury...confinement in jail for not more than twelve months and a fine of not more than $ 1,000, either or both."

(C.) Va. Code Section 8.01-678:

"When it plainly appears from the record and the evidence given at trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed:

"(2) For any...error committed on the trial."

STATEMENT OF THE CASE

On the morning of December 16, 1988, police set up surveillance of the house at 4809 Portsmouth Boulevard in Chesapeake, Virginia, which they thought was being used for the distribution of marijuana. At about 5:00 p.m., a white Saab with two occupants pulled into the driveway of the premises. The driver of the car, a police informant, waited while his passenger went inside the house. A few minutes later, the passenger returned. None of the officers saw whether the passenger was carrying anything when he left the house. Once the passenger was back inside the car, it drove away.

The Saab crossed into an adjacent city, followed by two policemen. At 5:25 p.m., they stopped the Saab and found the vehicle to contain marijuana. The

passenger, Steve Briand ("Briand"), was arrested and taken into custody.

At approximately 6:15 p.m., the two policemen who followed the Saab returned to the house at Portsmouth Boulevard, where police cars were already waiting in the driveway. The police decided to "secure" the house until a search warrant could be obtained. One officer went to the front door of the house with the intention of knocking while a group of other officers, dressed in plain clothes, went around to the back door.

<u>According to the Commonwealth's evidence</u>, as the police came around the rear of the house, Smith opened the back door and stepped forward onto the small concrete back porch. He was carrying with him one or more large green plastic bags of the kind widely used for household garbage. Upon spying Smith, the

police yelled and shined their flashlights at him. Smith stepped back inside and locked the door. The police then gave chase, breaking down the door and charging into the house.

According to Smith's evidence, he did not go to the back door, and was talking on the telephone when the police entered. Even on appeal, this dispute in the evidence is relevant because it may bear on the question of whether the unconstitutional hearsay was harmless.

Once the police entered the house, they found several clear bags of marijuana lying in the bedroom, including some they said spilled from the large trash bag they said Smith was carrying. They also found Debbie Steele ("Steele") and her three minor children. The police then proceeded to secure the premises.

Smith and Steele were both arrested and taken away. A search warrant was then obtained based upon an affidavit that included material facts observed during the warrantless entry. (A. 66.)[1] With warrant in hand, the police discovered some additional marijuana as well as several thousand dollars in money. The total weight of all marijuana introduced into evidence was 12.1 lbs. Only one overall tabulation was introduced. There was no breakdown between the quantities found before and after the issuance of the warrant.

At trial, it was undisputed that Smith and Steele were co-lessee's of the house, that Steele lived there with her three minor children, and that Smith--who was not married to Steele--was the father

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[1] Page references are to the Appendix at the back of this Petition.

of the children. It was also undisputed that Smith still had some property there. What was disputed was whether Smith resided there or was merely visiting on the day in question. Two witnesses swore that Smith was a resident of Windsor. No fingerprints of Smith were found, nor was there any evidence of adult male clothing stored on the premises. Moreover, none of the policemen were able to say that they saw Smith arrive before the visit by the white Saab.

Instead, the Commonwealth relied heavily upon the testimony of two officers who broke off their surveillance of the house to attend to other business for 15-20 minutes in the afternoon. When they returned, the vehicle previously sitting in the front yard had been joined by a second vehicle. No one saw the driver of either of these vehicles, but the two

officers testified--over the objection of defense counsel--that both vehicles were registered to Smith. One officer went so far as to say that the vehicles were registered to Smith at that address.

Other evidence--apparently rejected by the jury in the face of the testimony about vehicle registration--was that Smith caught a ride from a friend, and did not arrive until about 5:30 or 6:00. This was after the white Saab left, carrying away Briand, the one clear marijuana trafficker in the entire case. This testimony came from Steele, who also admitted that Briand was the owner of the marijuana and that she let Briand use her house as a place to hide it.

Smith was charged with possession with intent to sell more than five pounds of marijuana, in violation of Va. Code Section 18.2-248.1(a)(3). Under Virginia

law, this is a far more serious offense than possessing five pounds or less. The defendant is exposed to a maximum of 30 years imprisonment rather than a maximum of 10. Compare Va. Code Section 18.2-248.1(a)(2) and (3).

Smith filed a written motion to suppress all evidence obtained by the police from the premises where he was arrested, whether obtained through their warrantless entry or through their subsequent use of a search warrant. (A. 73.) This motion was denied by the trial court at a pre-trial suppression hearing. (A. 76.)

Smith then re-filed his motion to suppress. (A. 77.) He also raised the issue orally, both at the beginning of trial and at the conclusion of the prosecution's evidence. The motions were again denied. (A. 79, 80.)

During the trial, defense counsel twice voiced the concise objection "hearsay" to police testimony linking Smith to two vehicles parked at the Portsmouth Boluevard address where the marijuana was found. These objections were overruled and the testimony was admitted into evidence. Smith was convicted as charged and sentenced to 25 years in prison.

Smith then petitioned the Virginia Court of Appeals. The suppression issues were raised and argued by Smith in his Petition for Appeal, Brief of Appellant and Reply Brief of Appellant. The Virginia Court of Appeals held that entry by police on the premises before obtaining the search warrant was not unlawful and that, even if the entry had been unlawful, sufficient untainted information was contained in the affidavit to justify

issuance of the warrant.

Appealing to the Virginia Court of Appeals, Smith further articulated his objection to the testimony about vehicle registration, expressly addressing both common law and Sixth Amendment components of his previous "hearsay" objection. These arguments were contained in his Petition for Re-hearing (following the initial refusal to grant an appeal on this testimony), the Brief of Appellant, Reply Brief of Appellant and Petition for Re-hearing. The Virginia Court of Appeals held that the testimony in question was hearsay, but ruled that it was harmless under a standard used in cases of non-constitutional error. Thus, the Virginia Court of Appeals implicitly declined to pass upon the Sixth Amendment implications of the objection.

The Fourth Amendment suppression issues, as well as the Sixth Amendment confrontation issue, were also raised by Smith in his Petition for Appeal to the Supreme Court of Virginia; but, the Petition for Appeal was refused.

ARGUMENT

I. THE WARRANTLESS ENTRY CANNOT BE JUSTIFIED BY THE EXIGENT CIRCUMSTANCE EXCEPTION SINCE THE POLICE CREATED THE EXIGENCY.

> "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."
>
> Payton v. New York, 445 U.S. 573, 590, 101 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

In the case at bar, the police entered the house on Portsmouth Boulevard without a warrant, based upon their alleged fear of discovery, and found both Smith and a supply of marijuana. [2] At issue in the case is whether police may use fear of

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[2] Although Smith did not live at the Portsmouth Boulevard address, he nevertheless had a possessory interest in the premises as a co-lessee who still had some property there. At the time of the warrantless entry, Smith was visiting the other co-lessee, Steele, who lived in the

discovery to justify a warrantless entry when the risk of discovery was created by the police. Several of the United States courts of Appeal have ruled, in one form or another, against the use of police-created exigencies. These include United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980); United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974); United States v. Segura, 663 F.2d 411 (2nd Cir. 1981), aff'd on other grounds, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599; United States v. MacDonald 916 F.2d 766 (2nd Cir. 1990).

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house together with their minor children. Based on these facts, Smith had a reasonable expectation of privacy so as to give him standing to raise a Fourth Amendment objection to the warrantless entry by the police. See United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

In the case at bar, the Virginia Court of Appeals paid lip service to this rule,[3] but failed to apply it to the facts of the case, deciding instead that exigent circumstances justified the warrantless entry. Although the Court ascribed its decision to what it termed "the totality of circumstances" (A. 58.), the central and decisive factor was police fear that <u>their own actions</u> would cause them to be discovered before a warrant could be obtained:

> "[A]fter the sale to Briand, the police had detained and released the occupants of three vehicles that had stopped at the residence. Any of the persons in those vehicles could have telephone appellant's residence and advised him of their experience, alerting Smith to the surveillance.

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[3] The Court of Appeals said that "a warrantless entry is justified when. . . (3) the police did not create the exigency which is the basis of the entry." citing <u>Crosby v. Commonwealth</u>, 6 Va. App. 193, 200-01, 367 S.E.2d 730, 735 (1988).

"'This fear of discovery is itself an exigent circumstance.' United States v. Curran, 498 F.2d 30, 35 (9th Cir. 1974)."

(A. 57)

If there was any risk of discovery here, which Smith disputes, it was plainly a risk created by the police. Moreover, it was a risk unreasonably created because there was insufficient reason for the police to confront third parties by stopping and detaining the three other vehicles in question.

If the police had probable cause to believe that the three other vehicles they stopped contained marijuana, then perhaps they could be excused for having created any resultant risk of discovery. The facts show, however, that the police had no such probable cause, nor even a reasonable suspicion that the vehicles contained marijuana. Although there is evidence

that the three other vehicles "went up" to the house in question after the white Saab left the premises, there is no evidence anyone got out of any of these vehicles and entered the house, or vice versa, nor is there any evidence that the police were expecting a delivery of illegal drugs to the premises. Indeed, there is no reason to believe that the three other vehicles were doing anything more sinister than turning around in the driveway; and, since the burden of justifying the warrantless entry is on the government, any deficit in evidence on this point must be held against the prosecution, not against Smith.

Even if there had been contact between occupants of the house and occupants of the vehicles, there would still be a critical element missing in trying to establish a reasonable basis for

the stop of the vehicles, since there is no evidence that the three other vehicles were stopped only after the discovery of marijuana in the white Saab gave probable cause to believe marijuana was in the house. Without probable cause to believe there was marijuana in the house, there was surely no reason to believe that the three other vehicles that wandered onto the scene had any connection whatsoever to criminal activity.

Indeed, even after the three vehicles were stopped, there was no evidence that the occupants were connected to marijuana trafficking, or knew the house was being used for that purpose, or knew their stop was related to their brief appearance at the house, or even knew the occupants of the house. Thus, the basic police contention that stopping these three vehicles created a risk of discovery

is unpersuasive. There was insufficient reason for the police to to believe that anyone was going to call the house at Portsmouth Boulevard and warn them about police activity. Thus, not only must the police be faulted for creating any risk of discovery that may have existed, but the alleged risk of discovery must be deemd too speculative to be the basis for a warrantless entry.

Whether a risk of discovery may be said to exist--and when the police may be excused from having creating it--are important federal questions that have not been, but should be, decided by this Court. While the existence of a risk of discovery may be a largely fact-specific question, this case nevertheless affords the opportunity to establish some general guidelines.

Smith contends that, in order for police confrontation of third parties to give rise to a judicially cognizable fear that the third parties will warn the suspects, there normally must be evidence (i) that the third parties knew the suspects, and (ii) that the third parties knew that the police had the suspects under investigation. Under the facts of this case, neither of these two factors are present. Given the lack of any movement or communication between the vehicles and the house, there is no evidence that the occupants of the vehicles knew the occupants of the house. Moreover, there is no evidence that the occupants of the vehicles would have inferred that the reason for their having been stopped was linked to their brief appearance at the premises in question.

With respect to when the police may be excused for having created an exigency, there is a split among the U. S. Courts of Appeal so as to warrant this Court deciding the question. In Segura, supra, the Second Circuit appeared to endorse a more expansive view of police fault, but, in MacDonald, supra, it retreated to the view that police are to be faulted for created an exigency only when it is the result of illegal police activity. By contrast, the Seventh Circuit appears to hold to a very expansive view, as expressed in Rosselli, supra, which goes well beyond faulting police for illegal conduct. Indeed, in Rosselli, the police action that was held to have impermissably created an exigency was a simple act of omission: the failure of police to leave an agent with the co-tenant of an arrested drug dealer while a warrant was obtained

to search the apartment of a confederate. 506 F.2d at 629. While Segura may no longer be good law in the Second Circuit, both Segura and Rosselli appear to have survived in the Seventh Circuit, having been cited approvingly as recently as United States v. Napue, 834 F.2d 1311, 1328 (7th Cir. 1987).

Smith contends that, when the police activity in question involves the confrontation and temporary detention of third parties, the police must bear the burden of any risk of discovery thereby created unless, at a minimum, their action meets the following criteria: (i) the confrontation is reasonably designed to advance legitimate investigative interests, (iii) it is carried out in a manner that does not needlessly increase the risk of discovery, and (iii) any temporary detention passes constitutional

muster. Without these or similar safeguards, it will be far too easy for police to evade the warrant requirement by the wholly gratuitous confrontation or temporary detention of third parties, whose contact with police could then be used to assert a fear that the third parties will warn the suspects. The stopping and temporary detention of the three vehicles in question failed on points (i) and (iii) since it was neither a reasonable investigative procedure nor constitutionally justified. With respect to point (ii), there is no evidence that the three vehicle stops were carried out in a manner that unreasonably increased the risk of discovery. And, while this would tend to diminish police responsibility for any such risk, it also diminishes the alleged risk on which the police rely.

B. EVIDENCE SEIZED BY POLICE DURING ILLEGAL, WARRANTLESS ENTRY CANNOT BE SAVED BY THE INDEPENDENT SOURCE DOCTRINE AND SHOULD BE SUPPRESSED.

Following the warrantless entry, the police presented to a local magistrate an affidavit for search warrant that combined information obtained prior to the entry with information obtained during the entry. (A. 66-72.) The Virginia Court of Appeals found the warrant to be valid, despite the presence of facts obtained during the entry:

> "Notwithstanding the alleged tainted material facts contained in the affidavit, "putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffice[d] to show probable cause." United States v. Giordano, 416 U.S. 505, 555 91974) (Powell, J., concurring in part, dissenting in part). This information provided the necessary "substantial basis" from which to conclude the contraband was in the house. See Illinois v. Gates, 462 U.S. 213, 236 (1983)."
>
> (A. 58, 59.)

The problem with this analysis is that the Court of Appeals used the wrong standard. The effect of an illegal entry upon a subsequent search warrant for the same premises must be measured by the guidelines enunciated in Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), a case decided after the Giordano and Gates cases on which the Court of Appeals relies.

In Murray, federal agents followed two vehicles as they left a warehouse, legally stopped them some distance away, and found them to be carrying marijuana. The agents then returned to the unoccupied warehouse, where they broke in and found, in plain view, numerous burlap-wrapped bales of what later proved to be marijuana. The agents then left the warehouse--with the bales undisturbed--and sought out a magistrate, from whom they

obtained a search warrant. In applying for the warrant, the agents omitted any reference to the warehouse break-in. Upon returning to the warehouse with the warrant in hand, the agent seized the bales which now proved to be marijuana, as well as certain previously undiscovered records. Two points in Murray touch upon the question of whether the independent source doctrine would permit the government to introduce the evidence collected pursuant to the search warrant at the scene of the previous illegal entry.

A. Information Gained During The Warrantless Entry Affected The Decision To Issue The Warrant.

The first point in Murray deals with the connection between illegally discovered evidence and an ensuing warrant. The Court said:

> "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."
>
> 487 U.S. at 542, 108 S.Ct. at 2536; emphasis added.

What is unclear from the decision in Murray is exactly what is meant by the phrase "affected his decision to issue the warrant." At least two interpretations suggest themselves:

(i) Is the tainted information a substantial contributing factor to the decision to issue the warrant?

(ii) Is the tainted information necessary to a issue the warrant?

In the case at bar, even if the tainted information was not necessary to a

finding of probable cause, it was nevertheless a substantial contributing factor to the magistrate's decision to issue the warrant. As shown by the affidavit for search warrant, the information the police presented to the magistrate included substantial details about what he saw during his entry into the house at Portsmouth Boulevard, including marijuana on the floor, marijuana allegedly spilling from the bag Smith was carrying, and marijuana on the kitchen table. As the police knew and intended in preparing the affidavit, this sort of "caught-em-red-handed" evidence is so overwhelming as to contribute substantially to any magistrate's decision whether to issue a warrant.

Thus, the question is which of the two interpretations of Murray is more appropriate. Given that the purpose of

the exclusionary rule is to provide an incentive against government violations of the Fourth Amendment, the better approach is to deny a warrant its status as an independent source if the tainted information is a "substantial contributing factor" to the magistrate's decision. By basing its decision on whether the untainted facts provide a "substantial basis" for the warrant, the Virginia Court of Appeals has adopted an approach which resembles the second, more permissive interpretation of Murray. Thus, the state court has decided an important question of federal law which has not been, but should be settled by this Court.

B. The Warrant Cannot Save Evidence Discovered Before It Issued And Continuously In Police Possession.

The second point in Murray deals with the question of whether even a valid warrant can be a genuinely independent source of evidence already discovered by the police and continuously in their possession. In United States v. Segura, supra, the Second Circuit drew a distinction between evidence discovered and seized during an illegal entry and evidence discovered only after the subsequent issuance of a valid search warrant. The Second Circuit excluded the former kind of evidence, but allowed the latter.

When Segura was heard by this Court on writ of certiorari, no issue concerning items observed during the initial entry was considered. Segura v. United States, 468

U.S. 796, 804, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1983). The Court did, however, signal its apparent agreement with the suppression of pre-warrant evidence when it wrote, in dictum, that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." 469 U.S. at 812.

In Murray, this Court strongly implied a view consistent with the Second Circuit's exclusion of illegally discovered and seized pre-warrant evidence. Commenting on the independent source doctrine, this Court said:

> "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply."
>
> 487 U.S. at 542, 108 S.Ct. at 2535.

It is the parenthetical phrase in the above quotation that aligns this Court in Murray with the Second Circuit in Segura. Smith recognizes that the parenthetical phrase is dictum since the federal agents in Murray completely departed from the warehouse when they went to seek a warrant, thereby relinquishing possession of the evidence. In present case, however, the police exercised continuous dominion and control over the premises and everything in it from seconds after they entered until after the warrant arrived several hours later. Smith contends that this continuous police possession of the unlawfully seized goods prevented a truly independent re-seizure from occurring, so that the independent source doctrine does not come into play.

Smith also recognizes that the Second Circuit has now disavowed that portion of its decision in Segura that evidence illegally discovered prior to a warranted search must necessarily be suppressed. United States v. Whitehorn, 829 F.2d 1225, 1231 (2nd Cir. 1987), cert. denied 487 U.S. 1237, 108 S.Ct. 2907. Yet, the dictum in Murray, which came after Whitehorn, suggests that this Court may approve of the Second Circuit's original position in suppressing the pre-warrant evidence.

This case furnishes an opportunity for the Court to declare whether the view suggested by its remarks in Segura and Murray is to be its established ruling on the issue. By failing to address the issue in its opinion, the Virginia Court of Appeals in effect rejected the Segura - Murray dictum. Thus, the state court implicitly decided an important question

of Fourth Amendment which has not been, but should be settled by this Court.

C. The Error Was Not Harmless.

Smith concedes that, even under the standard enunciated by the Second Circuit in Segura, marijuana that was not discovered until a valid search warrant was issued would be admissible. Yet, under the facts of this case and assuming the warrant to be valid, the introduction of the admissible marijuana does not render harmless the introduction of the marijuana that should have been suppressed. The record does not show separate measurements for the two seizures of the substance. If the illegally seized marijuana were excluded from evidence, as it should have been, Smith might still be convicted of simple possession; but, it cannot be said beyond a reasonable doubt

that he would have been convicted of the more serious offense of possessing more then five pounds of the substance. Thus, the admission of the pre-warrant evidence was not harmless "beyond a reasonable doubt" and the conviction must be overturned. Chapman v. California, 386 U.S. 18, 87 S.CT. 824, 17 L.Ed.2d 705 (1967).

III. IMPROPER HEARSAY ABOUT VEHICLE REGISTRATION VIOLATED THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

The Court of Appeals ruled correctly that the trial court violated the hearsay rule by admitting police testimony that two vehicles parked in front of 4809 Portsmouth Boulevard belonged to Smith and were registered to him at that address. The Court was mistaken, however, in evaluating the harmfulness of the error under the state standard used for errors

of non-constitutional dimension. The state standard, found at Va. Code Section 8.01-678, provides no judgment shall be reversed for any error committed at trial if "it plainly appears...that the parties have had a fair trial on the merits and substantial justice has been reached." (Emphasis added.) This "plainly appears" standard is more tolerant of error than the standard prescribed for errors of constitutional dimension, which requires a finding that the error was harmless "beyond a reasonable doubt." Chapman v. California, supra.

In arguing to the Virginia Court of Appeals, Smith maintained that the hearsay in question violated his right to confront and cross-examine his accusers, as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. The Commonwealth objected to this argument

being considered, claiming a procedural bar on the grounds the argument had not been raised before the trial court. The Court of Appeals apparently concurred, since it applied the non-constitutional standard to the error it found. Smith disagrees and contends that the constitutional objection is fairly contained within the concise "hearsay" objection offered by Smith's counsel at trial.

Common law hearsay rules and the Confrontation Clause are designed to protect similar values. California v. Green, 399 U.S. 149, 155, 90 S.Ct 1930, 1933, 26 L.Ed.2d 489 (1970). Those values include the right of an accused to confront and cross-examine the real witness against him. Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). Indeed,

"the [Confrontation] Clause was intended to exclude some hearsay," Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980) (Emphasis added). The hearsay objection uttered at trial by defense counsel was sufficient to raise both the common law objection and the Confrontation Clause objection to that hearsay. Indeed, as recently as White v. Illinois, 60 USLW 4094, 4095, ___ U.S. ___ (1992), this Court considered an Confrontation Clause objection to testimony on which the opinion reports only a "hearsay" objection at trial. The constitutional objection was likewise properly raised by Smith's "hearsay" objection and should have been considered by the Virginia Court of Appeals.

Once it is established that the constitutional objection was not waived, there can be no doubt that the testimony

about vehicle registration violated the Confrontation Clause. A similar case, Coleman v. Johnson, 574 F.Supp. 360 (W.D. Va. 1983) arose out of a prosecution in which the defendant was convicted on state charges of burglary and grand larceny. The defendant petitioned for a federal writ of habeas corpus. He claimed that a deputy sheriff's testimony about ownership of a vehicle in which stolen goods were found should have been excluded as hearsay. The federal court agreed, ruling that the admission of such testimony from the deputy violated the Confrontation Clause.

As the court in Coleman also noted:

> This error of evidential admission stands in spite of the fact that the reliability of the information could have been established by one of two procedures: namely, by the calling of the actual compiler of the [DMV] report as a witness; or pursuant to Va. Code Sections 46.1-34 and 46.1-34.1. [now 46.2-213 and 46.2-215] by

> the proffering of the certification of the license plate number of the motor vehicle as prima facia evidence of ownership.
>
> Id. at 361, 362.

By the same logic, the testimony about vehicle ownership by the two police officers in the case at bar was unconstitutional hearsay and should have been excluded, especially since the prosecution made no attempt to demonstrate the unavailability of the DMV representative. Ohio v. Roberts, 448 U.S. 56 (1980).

By allowing the unconstitutional testimony to be evaluated by a less demanding standard than that required by Chapman, supra, the Virginia Court of Appeals decided a federal question in a way that conflicts with the applicable decisions of this Court. On this basis, the error is appropriate for a writ of certiorari. Smith respectfully requests

that a writ be granted on this point; that the police hearsay be found in violation of the Confrontation Clause; and that the conviction be reversed based on the harmfulness of the unconstitutional hearsay. In the alternative, if the conviction is not vacated by this Court, then Smith asks the case remanded to the Virginia courts for consideration of the harmfulness of the hearsay under the "beyond a reasonable doubt standard" of Chapman.

While considerations of judicial economy may make such a remand advisable, Smith would nevertheless urge the Court not to view the harmfulness issue as foreclosed based the unfavorable analysis contained in the opinion of the Virginia Court of Appeals. Perhaps because the analysis under the state standard was less demanding, the analysis by the Court of

Appeals contains certain erroneous and incomplete readings of the record that would not likely be repeated if the review were conducted with the more stringent "beyond a reasonable doubt" standard in mind. For example, on the question of where Smith lived, which is the point addressed by the hearsay, the Court of Appeals said: "Debbie Steele testified that Smith lived at 4809 Portsmouth Boulevard on December 16, 1988." In fact, the testimony of Ms. Steele was just the opposite:

> Q. Was he living in the home in December of 1988.
>
> A. No.
>
> Q. And how long had it been since Mr. Smith lived there?
>
> A. He moved out -- seven months he had been moved out.
>
> Q. Do you recall where he was living or do you know where he was living of you own knowledge?

A. He was living in Windsor.

While other examples could be found, the point seems clear enough. Once it is established that the harmfulness of the hearsay must be reviewed under the Chapman standard, a new review based directly on the record would be in order.

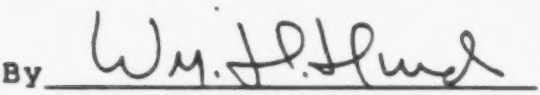
CONCLUSION

At trial, a great deal of improper and very damaging evidence was introduced against Smith over the objections of his trial counsel. The evidence violated the Fourth and Sixth Amendments, as made applicable to the states by the Fourteenth Amendment. The improper evidence included (i) evidence gained by an illegal, warrantless entry, (ii) evidence gained by a tainted search warrant, and (iii) hearsay testimony that two vehicles parked

at the house where marijuana was found were registered to him at that address. The trial court and Court of Appeals erred in allowing this evidence and/or in deeming it harmless. Smith respectfully prays that a writ of certiorari be granted; that the judgment of conviction should be vacated and the case remanded for a new trial with the improper evidence excluded.

Respectfully Submitted,

RODNEY WAYNE SMITH

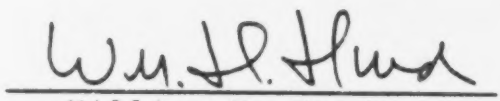
By 
Counsel

William H. Hurd
Attorney at Law
2803 McRae Road
Richmond, Virginia 23235

(804) 272-2006

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of November, 1992, I caused three copies of the foregoing Petition for Writ of Certiorari to be served, by first class mail, on Hon. Mary Sue Terry, Attorney General of Virginia, and H. Elizabeth Schaffer, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219 (804) 786-2071.



William H. Hurd

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APPENDIX

COURT OF APPEALS
OF VIRGINIA

Present: Judges Baker, Moon and Willis
Argued at Norfolk, Virginia

RODNEY WAYNE SMITH

v. RECORD No. 0707-90-1 MEMORANDUM*
OPINION BY JUDGE
COMMONWEALTH OF VIRGINIA NORMAN K. MOON
JANUARY 21, 1992

FOR THE CIRCUIT COURT
OF THE CITY OF CHESAPEAKE
Russell I. Townsend, Jr., Judge

Gary C. Byler (William H. Hurd, on briefs)

H. Elizabeth Shaffer, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

Rodney Wayne Smith seeks reversal of his conviction of possession of marijuana with the intent to distribute. He alleges that (1) trial court erred in refusing to suppress evidence obtained pursuant to a search warrant that was issued after the police had unlawfully entered the premises under the pretense of securing them against destruction of evidence and contraband; (2) the affidavit for the

search warrant was based upon information obtained by the illegal entry of the premises; and (3) the trial court erred in admitting hearsay evidence that two vehicles were registered in his name. We affirm the judgment because we hold that entry of the premises before obtaining the search warrant was not unlawful; that even if the entry had been unlawful, sufficient untainted information was contained in the affidavit to justify issuance of the warrant; and that the error in admitting hearsay testimony concerning the registration of two vehicles was harmless error.

On appeal, we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537

(1975). This Court examines the records of both the suppression hearing and the trial to determine whether the evidence was lawfully seized. DePriest v. Commonwealth, 4 Va. App. 577, 583, 359 S.E.2d 540, 542-43 (1987), cert. denied, 488 U.S. 985 (1988).

Here, the evidence supports the Commonwealth's claim that the police entered the premises in an effort to secure the premises to prevent destruction or loss of the Commonwealth's money or contraband. Such a warrantless entry is justified when (1) the police have probable cause to believe that evidence is on the premises; (2) delaying entry would create a substantial risk that the evidence will be lost or destroyed; and (3) the police did not create the exigency which is the basis of the entry. Crosby v. Commonwealth, 6 Va. App. 193, 200-01,

367 S.E.2d 730, 735 (1988). "'[I]n determining whether... circumstances were sufficient to overcome the presumption of unreasonableness and justify a warrantless entry, the court must examine the circumstance as they reasonably appeared to the law enforcement officers on the scene [when the decision to enter was made].'" Id. at 201, 367 S.E.2d at 735 (quoting Verez v. Commonwealth, 230 Va. 405, 411, 337 S.E.2d 749, 753 (1985), cert. denied, 479 U.S. 813 (1986)).

Appellant concedes that the police had probable cause to believe that evidence was on the premises. Their surveillance of the Saab and its occupants from the time it stopped at the residence and their later questioning of the occupants provided that information. The officers knew that the appellant was on the premises, that he had sold marijuana

to Stephen Briand, and that he had accepted at least $ 5800 of marked currency for the marijuana.

In determining whether emergency circumstances exist, some of the relevant factors courts have considered are: (1) the degree of urgency involved and the amount of time necessary to procure a warrant; (2) the reasonable belief that the contraband or evidence is about to be removed; (3) the possibility of danger to the police officers guarding the premises containing the evidence; (4) information indicating that the contraband's possessors are aware that they are under investigation by the police; and (5) "the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior or persons engaged in the narcotics traffic.'" United States

v. Rubin, 474 F.2d 262, 268-9 (3d Cir.), cert. denied sub nom. Agran v. United States, 414 U.S. 833 (1973) (quoting United States v. Manning, 448 F.2d 992, 998-99 (2d Cir.), cert. denied, 404 U.S. 995 (1971)).

Detective Barber testified that from the time the police realized they possessed the probable cause necessary for the warrant it would have taken four hours to obtain a search warrant. The police had observed at appellant's house considerable traffic both before and after Briand's original purchase of the marijuana. Several vehicles arrived and left before the purchase and three arrived and left after it. The police knew that it was not appellant's practice to leave the contraband within the house for long periods of time but that he only brought it there when he was anticipating a sale.

Thus, they had cause to believe that once the substantial sale to Briand had been completed, Smith might attempt to remove the remaining contraband and the money. The police also knew that the appellant had previously been convicted of firearms offenses, one of possession and two of brandishing, which increased the danger to the officers who remained on surveillance at the house.

Furthermore, after the sale to Briand, the police had detained and released the occupants of three vehicles that had stopped at the residence. Any of the persons in those vehicles could have telephoned appellant's residence and advised him of their experience, alerting Smith to the surveillance. "This fear of discovery is itself an exigent circumstance." United States v. Curran, 498 F.2d 30, 35 (9th Cir. 1974). Finally,

the police knew that contraband is readily destructible and efforts to dispose of narcotics and to escape are characteristic behavior of drug distributors. Appellant's actions also increased the possibility of destruction of the marijuana or escape. The police knew from Briand that Smith had the trash bags full of marijuana in the house. They knew it was appellant's method of operation not to store it in the house but to wait until he knew a cash buyer was en route before he procured the marijuana. Thus, we conclude from the totality of the circumstances that the trial court did not err in determining that exigent circumstances existed to secure the premises.

THE SEARCH WARRANT

Notwithstanding the alleged tainted material facts contained in the affidavit, "putting aside all tainted allegations,

the independent and lawful information stated in the affidavit suffice[d] to show probable cause." United States v. Giordano, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part, dissenting in part). This information provided the necessary "substantial basis" from which to conclude the contraband was in the house. See Illinois v. Gates, 462 U.S. 213, 236 (1983).

HEARSAY EVIDENCE

The only objection raised to Officer Johnston's testimony that he had contacted the Division of Motor Vehicles, had checked the registration of two vehicles parked in front of 4809 Portsmouth Boulevard, and had learned that they were registered to the appellant at that address, was that his testimony constituted hearsay. The admission of the testimony violated the hearsay rule.

Notwithstanding that violation, we are satisfied that it was harmless error because "it plainly appears form the record and the evidence given at the trial that the [appellant has] had a fair trial on the merits and substantial justice has been reached." Lavinder v. Commonwealth, ___ Va. App. ___, 407 S.E.2d 910-11 (1991) (en) (banc) (quoting Va. Code Section 8.01-678).

The evidence in this case is so overwhelming that no rational trier of fact could have believed appellant did not possess the marijuana. He defense was that he did not live at the residence where he was arrested. However, the evidence showed that he ran out the back door of the house holding trash bags containing several pounds of marijuana and then ran back into the house and into the bedroom in which the other marijuana was

later found. Photographs of the appellant dating back many years and a video tape of him and Debbie Steele, a co-defendant and mother of appellant's three children, the oldest of whom was approximately ten, dated February , 1988, were also found in the house. In the bedroom, police also found a ledger containing telephone bills with the appellant's name on them. Debbie Steele testified that Smith lived at 4809 Portsmouth Boulevard on December 16, 1988. She admitted that the house was rented in his name, that all the bills connected with the house (utilities, sewage, sanitation, telephone) were in his name, and that the statement of wages, with the name "Wayne" on it, which was found in the bedroom, belonged to appellant. She also admitted that appellant drove the green van parked in front of the house, which was the subject of the alleged hearsay.

Thus, even without the testimony about the vehicle registration, the only conclusion about appellant's guilt permitted by the evidence was the one the jury reached. For this reason, the admission of the alleged hearsay testimony was harmless.

Affirmed.

V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA
ON WEDNESDAY THE 11TH DAY OF MARCH, 1992

RODNEY WAYNE SMITH,

Appellant,

against Record No. 0707-90-1
Circuit Court No. 89-365

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing
Before Judges Baker, Moon and Willis

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 21st day of January, 1992 and grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:

Patricia G. Davis, Clerk

By: /s/ Cynthia L. McCoy

Deputy Clerk

V I R G I N I A:

IN THE SUPREME COURT OF VIRGINIA
ON MONDAY THE 10TH DAY OF AUGUST, 1992

RODNEY WAYNE SMITH,

Appellant,

against Record No. 920524
Circuit Court No. 0707-90-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

And it is ordered that the Commonwealth recover of the appellant the costs in the courts below.

Justice Keenan took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/
Deputy Clerk

SEARCH WARRANT NO

ITEM # 4 The Material Facts Constituting Probable cause:

On 12-16-88, Special Agent Calvin Johnston of the Virginia State Police contacted Detective W.H. Barber of the Chesapeake Police Dept. requesting assistance on a mariuana transaction that was originating in Richmond, Va and was planned to be held in Chesapeake, Va.

S/A Johnston relayed the following facts, Richmond Virginia Police Dept. had a informant who had supplied information that a white Saab vehicle would leaving the Richmond area enroute to 4809 Portsmouth Blvd. in the City of Chesapeake to make a multi-pound marijuana purchase.

Richmond police stated this purchase would be over a thousand dollar figure.

On the afternoon of December 16, 1988, Richmond police along with Virginia

State Police conducted rolling surveillance of this white Saab from Richmond until this vehicle pulled into the residence of 4809 Portsmouth Blvd., Chesapeake, Virginia.

Special Agent Johnston and other police personnel had maintained surveillance on 4809 Portsmouth Blvd., Chesapeake, Virginia from approximately 11:30 A.M. During this surveillance approximately six(6) vehicle's came to and left this house.

At approximately 4:55 P.M., 12-16-88, affiant observed the aforementioned Saab vehicle pull into 4809 Portsmouth Blvd., in the city of Chesapeake, Va. This vehicle contained two (2) white male subjects. This Saab vehicle departed 4809 Portsmouth Blvd., Chesapeake, Va., at approximately 5:17 P.M., 12-16-88.

Police surveillance units followed this vehicle into the City of Suffolk, Virginia where it was stopped at Bennett's Pasture Road and Nansemond Parkway in Suffolk, Virginia. A search of this vehicle revealed approximately five(5) pounds of marijuana.

Detective Jay Boothe of the Richmond Police Department is the controlling detective of this informant. The informant was supplied with 6,750.00 dollars of U.S. currency has been photograph-copied to preserve the serial numbers.

The informant was driving this Saab vehicle from Richmond to Chesapeake and a search of the Saab vehicle, prior to departure from Richmond, revealed no evidence of marijuana in the vehicle.

At the scene of the stop of the Saab vehicle, the informant told Detective

Boothe that the passenger had purchased the marijuana with the U.S. currency obtained from Richmond Police Department while inside the residence of 4809 Portsmouth Blvd., Chesapeake, Virginia, and he had entered the Saab vehicle boasting of trash bags full of marijuana inside of the residence of 4809 Portsmouth Blvd., Chesapeake, Va.

During the time of the traffic stop, a police vehicle was assigned to maintain surveillance on 4809 Portsmouth Blvd., Chesapeake, Va. During this surveillance at least two(2) vehicles arrived and departed. Due to this agents/detectives believing Smith might be giving the U.S. currency that belonged to the Richmond Police Department, to his supplier and believing that the statements of the informant during the traffic stop indicating that more marijuana was inside

the house located at 4809 Portsmouth Blvd., Chesapeake, Virginia. This affiant accompanied with other agents/detective pulled into the yard of the house at 5:55 P.M.

Upon approaching the rear of 4809 Portsmouth Blvd., Chesapeake, Va., Rodney Wayne Smith opened the back door carrying two(2) large green trash bags. Upon observing the agents/detectives, Smith slammed and locked the back door. At this time, the agents/detectives used forcible entry into the dwelling to protect against the destruction of evidence, or the escape of Rodney Wayne Smith and for the protection of the agents/detectives against any possible assault directed at them.

Upon entry in the kitchen area, Smith was seen running into a room to the left. Detective Barber followed Smith into this

bedroom with all agents/detectives announcing "Police".

Once inside the bedroom Smith was throwing the green plastic bags on a bed and it opened revealing several plastics bags containing marijuana. A white female later identified as Debbie Steel was holding the bag on the bed. Another plastic bag of marijuana was in plain view on the bedroom floor.

Upon initial entry into the kitchen, Detective Barber observed several marijuana cigarettes in a ash tray on a dining room table.

Upon entry into this dwelling 3 juveniles ranging in age approximately from 5 to 10 years were inside.

Once all parties were controlled and the house was secured without any searching, SMITH, Rodney was arrested and transported to the Chesapeake Police Dept.

At this time law enforcenet agents are still inside this dwelling awaiting the presentation of these facts.

SMITH, Rodney has a Virginia computerized criminal history that reflects (1) 020181, conviction in Portsmouth for carrying a concealed weapon, (2) 071781, Portsmouth, conviction of possession of marijuana with intent to distribute, (3) 080181, Portsmouth, conviction of 2 counts of brandish a firearm, (4) Portsmouth, Va., 082181, convicted of destroying personal property, (5) Chesapeake, 041384, charged with possession of marijuana with intent, this charge was nolle prosses.

Det. W. H. Barber
AFFIANT

V I R G I N I A :
IN THE CIRCUIT COURT OF THE CITY
OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. DOCKET NO: 89-365

RODNEY WAYNE SMITH,

Defendant.

MOTION TO SUPPRESS

COMES NOW the defendant, Rodney Wayne Smith, by counsel, and pursuant to Section 19.2-60 of the Code of Virginia, 1950, as amended, moves the Court to Order the suppression of all evidence oral and physical, including any statements made by the defendant, Rodney Wayne Smith, whether prior to or subsequent to his arrest, and any property seized as a result of the arrest, detention or interrogation of the defendant, and any property seized by a warrantless search of the premise occupied by the defendant, and any property or

goods seized by virtue of the search warrant for the property occupies by the defendant, which warrant was issued by Albert Bud, magistrate on the 16th day of December, 1988, and the defendant further respectfully requests that the Court order any statement or evidence improperly obtained be excluded from any trial of charges brought against the defendant as a result of the seizure of such evidence and further, that such improperly obtained evidence not be used for any investigative purpose including obtaining derivative evidence; and in support of this Motion the defendant, by counsel, respectfully represents as follows:

That all evidence was obtained as result of an illegal search and seizure.

RODNEY WAYNE SMITH

/s/

By_____
Counsel

Donald S. Clarke, Esquire
CLARKE AND THOMAS, P.C.
3104 Arctic Avenue
P.O. Box 981
Virginia Beach, Virginia 2351

[EXCERPT FROM SUPPRESSION HEARING.]

MR. GIVANDO-CLIVE: About all I can tell you, Your Honor, we're here on a motion to suppress filed by the defendants, represented by Mr. Thomas and Mr. Clarke. Apparently, they're alleging a search that resulted in a seizure of a considerable amount of marijuana was illegal. And I'll let them take it from there.

* * * *

THE COURT: Okay. I don't see any -- it's just a question of credibility. I don't have any authority. I'm just going to base it on the evidence. I overrule your motion. Note your exception to the Court's ruling.

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY
OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA

INDICTMENT NO: 89-365

v.

RODNEY WAYNE SMITH

CHARGE: PWID MARIJUANA

MOTION AND NOTICE
PURSUANT TO SECTION 19.2-399

COMES NOW the Defendant, RODNEY WAYNE SMITH, by counsel and files this Motion and Notice, pursuant to Section 19.2-399 of the Code of Virginia (1950), as amended, and affirmatively makes his motion to suppress all evidence seized as indicent to or as basis for his/her arrest and/or seized as indicent to a search warrant on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to

the Constitution of the United States, or Article I, Section 8, 10 or 11 of the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self-incrimination, and further states that this Motion and Notice if filed not later than seven (7) days prior to trial.

/s/
By_____
Counsel

Warren David Kozak
Marcus, Santoro and Kozak
341 High Street
P.O. Drawer 69
Portsmouth, Virginia 23705

(804) 393-2555

[EXCERPT FROM BEGINNING OF TRIAL.]

MR. KOZAK: Your Honor, on April 19th of this year a suppression motion was made in this matter, and at this time I would like to reallege and reassert all the motions made in the motion for suppression and have that made a part of the record in this proceeding. I understand the Court is not going to rehear the suppression motion. It has already been heard by Judge Forbes. I would like those matters to be made a part of the record for purposes later on if necessary.

[EXCERPT AFTER PROSECUTION'S EVIDENCE.]

MR. KOZAK: Judge, obviously this case hinges on whether or not the police officers had a right to enter the dwelling and that matter has been covered in the suppression hearing. I would reassert all of the motions made at that point in time, that there is obviously no probable cause to enter the dwelling and no exigent circumstances that exist to give the police officer a right to enter without a warrant when obviously they would had have an opportunity -- since they had the place under surveillance, nothing could have gotten in or out without their knowledge. That would be my motion at this time, Judge.

THE COURT: I overrule your objection and note your exception.

V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY
OF CHESAPEAKE

ON THE 13TH
DAY OF DECEMBER, 1989

COMMONWEALTH OF VIRGINIA

v.

RODNEY WAYNE SMITH, Defendant.
SEX: Male RACE: White DOB: 1-13-60
SSN: 228-08-1064

ORDER - Felony No. 89-365

This day came the Attorney for the Commonwealth, and Rodney Wayne Smith who stands indicted for a felony, to-wit: Possess Marijuana With Intent to Distribute, Offense Date: 12-16-88, who appeared according to the condition of his own recognizance, and came also, Warren D. Kozak, counsel for the defendant.

Whereupon the accused was arraigned and after private consultation with his said attorney, pleaded not guilty to the

indictment, which plea was tendered by the accused in person, who requested a trial by jury.

The Court then impaneled twenty qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the Attorney for the Commonwealth and the Attorney for the defendant exercised their rights to strike names from the panel, as provided by law, and the remaining twelve jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the Court and jury heard the evidence presented by the Commonwealth and the defendant. At the conclusion of the Commonwealth's evidence, the Attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated

in the record, which motion was overruled and exception was noted.

After hearing the evidence, the instructions of the Court, and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court in the following words: We the jury find the defendant guilty of possession of marijuana with intent to distribute, and fix his punishment at: 25 years. s/ W.F. Clemons, Foreman.

Thereupon the jury was polled and all answered in the affirmative that the verdict as read by the Clerk was their verdict.

The Court then asked the defendant whether he desired to make a statement or to advance any reason why judgment should not be pronounced against him, according to law, the Court finds the defendant

guilty of Possess Marijuana With Intent to Distribute, as charged in the indictment, and sentences the defendant to confinement in the penitentiary of the Commonwealth for the term of twenty-five (25) years, and to pay the costs of Court in this case expended.

After pronouncing sentence, the Court advised the defendant of his right to petition the Court for an appeal to the Court of Appeals of Virginia and of his right to proceed in forma pauperis and to have the assistance of Court-Appointed Counsel.

The Court certifies that at all time during the trial of this case the defendant was personally present and capably represented the defendant.

And the defendant is remanded to jail to await transfer to the penitentiary,

therein to be kept, confined and treated in the manner provided by law.

ENTER: January 2, 1990

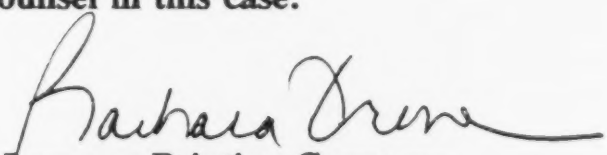
/s/

James C. Godwin, Judge

FILING AND MAILING CERTIFICATE

I hereby certify that on this 9th day of November, 1992, I filed 40 copies of a Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to the Honorable Mary Sue Terry, Attorney General of Virginia, and H. Elizabeth Schaffer, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.



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